No. 43060-6-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

TERRY L. BROWN,
Appellant

v.

JENNIFER A. CRANE (f/k/a BROWN)
Respondent

REPLY BRIEF OF APPELLANT

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A. THE TRIAL COURT ERRED BY INCLUDING THE AVERAGE OF SEVEN YEARS OF THE APPELLANT'S OVERTIME PAY WHERE SUCH INCOME IS NOT RELEVANT TO ESTABLISHING THE APPELLANT'S CURRENT INCOME FOR PURPOSES OF CALCULATING CHILD SUPPORT.

The court abused its discretion by including the average of seven years worth of Mr. Brown's overtime hours. Ms. Crane simply argues that the trial court did not err by including the overtime; she fails to provide a single citation to any case law to support the claim that the court properly included the average of seven years of overtime in its calculation for income for child support purposes.

It is important to note that seven years of average overtime brings the parties past the date of the last modification of the Order of Child Support, which occurred on December 7, 2007. As the respondent recognizes, the Court traditionally has declined to include Mr. Brown's overtime hours. See Respondent's brief pg. 7. By averaging years that preceded the modification of support in 2007 the court has clearly abused its discretion by ignoring the law of the case.

RCW 26.19.071 provides the following for verification of income: "(2) Verification of income. Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions. Other

sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs." Clearly, the legislature only places weight on the last two years of earnings for the purpose of calculating income for child support purposes. If the legislature had viewed seven years of past pay relevant then surely the statute would reflect that period of time in the verification of income subsection. It is clear that the legislature does not feel that pay information from beyond two years is relevant in determining the present income of the parties.

The court has previously held that the court is not required to consider obligor's past earnings in determining temporary child support; because obligor's income changed, his past earnings were no longer of primary relevance, and the court made no determination of voluntary underemployment. *Payne v. Caron*, 82 Wn. App. 147, 916 P.2d 968 (1996). In the present case it is undisputed that the number of overtime hours worked by Mr. Brown have dropped significantly over the past seven years. The three most current years show an average of approximately 60 hours of overtime, that is almost 200 hours less then the number adopted by the trial court. CP 213. It is important to note that the trial court did not enter a finding that Mr. Brown has voluntarily reduced his hours of overtime.

Ms. Crane has oddly failed to provide any argument as to how overtime hours accrued seven years ago are relevant to the court in determining Mr. Brown's present income. By including an average that is undisputedly top heavy in hours, the court has abused its discretion by including substantial income that is simply no longer available to Mr. Brown and as such this court should reverse the order of the trial court.

B. THE TRIAL COURT ERRED BY BASING ITS ORDER DECLINING TO ENTER A JUDGMENT FOR DAYCARE EXPENSES NOT ACTUALLY INCURRED SOLELY ON THE LANGUAGE OF THE 2007 PARENTING PLAN.

Judge Serko's 2007 Final Parenting Plan does not give Ms. Crane the authority to keep the children in daycare for as long as she deems appropriate. The plain language of the order only allows Ms. Crane to have sole decision-making as to what daycare provider she wishes to use for childcare. The order simply states: "Vicki Brown shall provide day care services for the children at this time. Mother has sole decision making authority to change this." CP 14. The court erred in holding that this language provides a basis for Ms. Crane to keep the children in daycare for as long as she deems appropriate. The language clearly indicates that the mother is allowed to provide daycare services and if she wishes to change to a provider she is free to unilaterally select a provider.

Therefore, the parenting plan does not provide a basis for denying entry of judgment for daycare expenses not actually incurred.

Oddly the respondent has devoted less then a paragraph of her brief responding to Mr. Brown's contention that Judge Serko's parenting plan does not provide a basis for denying entry of judgment and the respondent does not even address Mr. Brown's argument that the language of Judge Serko's order is the only evidence subject to review by this court. See Respondent's brief pg. 9. On a revision motion, a trial court reviews a commissioner's ruling de novo based on the evidence and issues presented to the commissioner. RCW 26.12.215; RCW 2.24.050; *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999). When an appeal is taken from an order denying revision of a court commissioner's decision, the court of appeals reviews the superior court's decision, not the commissioner's. *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008). *In re Marriage of Williams*, 156 Wn. App. 22, 27 (Wash. Ct. App. 2010). Here the court of appeals is charged with reviewing the superior court judge's order, not that of the commissioner.

The superior court simply stated, "The child support or daycare, Judge Serko was very clear about the daycare. I'm not changing Judge Serko's order. That's why commissioner Johnson denied the reimbursement." VRP 1/6/12 pg. 38. The court issued no further findings

on the matter. Therefore, it is clear that the trial court never considered any evidence for or against executing a judgment for daycare expenses not actually incurred and based its ruling denying judgment exclusively on the language of the parenting plan. The trial court only considered the order signed by Judge Serko and therefore that is the only issue before this court for review. The trial court never made any finding regarding the sufficiency of evidence.

Without waiving Mr. Brown's contention that the language of the parenting plan is the only evidence properly before this court to review, Mr. Brown does contend that, as stated in his opening brief, that if a court reviewed all evidence regarding daycare expenses there is sufficient evidence to support a judgment for daycare expenses not actually incurred. The respondent's brief seems to indicate that she believes that it is Mr. Brown's burden to show that daycare expenses were not actually incurred. Such a contention is incorrectly trying to shift the burden of the statute to Mr. Brown.

The respondent claims that the *Fairchild* court would determine that the evidence in the present case is sufficient to deny entry of judgment. The respondent points to four pieces of evidence: cancelled checks, bank statements, the respondent's own declaration, and the declaration of the daycare provider. See Respondent's brief pg. 9.

However, the respondent fails to take into account that both her own declaration and the declaration of her daycare provider, and best friend, are self-serving documents under the *Fairchild* analysis. See *Fairhchild v. Davis,* 148 Wn. App. 828, 833, 207 P.3d 449. The respondent does not deny that she was only able to produce documentation relating to approximately 58% of the expenses. Bank statements and other financial documentations do not distinguish between day care costs for Mr. Brown's biological children as opposed to day care expenses for children not biologically his. Lastly, looking at this case in light of *Fairchild*, the court would determine that any bank statements showing funds paid to Vicki Brown are again self-serving as the respondent had other children in daycare with Vicki Brown that were not Mr. Brown's biological children.

Even if the trial court had examined the evidence it would have determined that there was insufficient evidence produced by the respondent to deny entry of judgment. Furthermore, even if the court were to determine that Judge Serko's parenting plan gave total decision-making authority to the respondent, the respondent has provided no argument that such authority would trump the legislatively enacted statute requiring reimbursement for daycare expenses not actually incurred. Therefore, this matter should be remanded to the trial court for consideration of the evidence.

C. THE TRIAL COURT ERRED BY INCLUDING ALL MR. BROWN'S DISCRETIONARY INCOME WHEN THE PARTIES HAD SUFFICIENT BASE INCOME TO MEET THE LEGISLATIVE INTENT OF THE CHILD SUPPORT STATUTE.

The respondent's response provides no substantive argument in opposition to the fact that the trial court has abused its discretion by including all of Mr Brown's discretionary income for child support purposes while declining to include any of the respondent's discretionary income. The respondent simply states that "His argument defies even basic logic....[it] is wholly without merit and should be denied." The respondent does not directly respond to a single issue raised and provides no legal authority to support her claim other then a recitation of RCW 26.19.045.

As Mr. Brown stated in his opening brief, Mr. Brown's base income provides sufficient financial support as required by the child support statute. See Appellant's brief pg. 12. The respondent does not deny this in her response. Despite ample base income being available to fulfill the legislative intent of the child support statute, the court opted to include all of Mr. Brown's discretionary income and considered none of the respondent's discretionary income.

The language that the legislature used in the statute is of vital importance to determine the intent of the statute. The legislature has opted that veterans benefits may be considered as disposable income, not "shall" be considered. RCW 26.19.045. The choice of language is obviously crafted for allowing the court to consider the benefits as disposable income in situations where other income, which is mandatory to include as disposable income, is insufficient to provide for the financial needs of the children.

Including all of Mr. Brown's discretionary income and none of the respondent's is clearly a punitive ruling to punish Mr. Brown financially and is not made to further the intent of the child support statute and therefore is a clear abuse of discretion by the trial court.

D. THE COURT ERRED BY AWARDING ATTORNEY'S FEES TO THE RESPONDENT WITHOUT ANY EVIDENCE OF FEES ACTUALLY INCURRED.

The Court is required to evaluate the parties' financial situations pursuant to RCW 26.09.140. *In re Marriage of Coy*,160 Wn. App. 797, 248 P.3d 1101 (2011). A party will not be awarded attorney's fees in domestic proceedings absent a showing of need. *Roberts v. Roberts*, 69 Wn.2d 863, 420 P.2d 864 (1966). It is not the purpose of this section to

give one party free litigation, it is error to award costs where no need is shown. *Gibson v. Von Olnhausen*, 43 Wn.2d 803, 263 P.2d 954 (1952).

The respondent argues that her financial declaration supports her request for attorney's fees from the trial court. See Respondent's brief pg. 16. However, the financial declaration cited by the respondent only states funds paid into the attorney's office. CP 469. There is nothing in the declaration, or otherwise in the record, supporting fees actually incurred. Without knowing the fees actually incurred the trial court is unable to evaluate need versus ability to pay.

The lack of evidence of fees incurred is supported by the trial judges one sentence ruling holding: "It's clear that Ms. Crane has a need for attorney's fees and Mr. Brown has the ability to pay." 1/6/12 VRP 38. The trial court's statement is simply a conclusion. The Court offered no findings or evidence to support this conclusion.

E. THE APPELLATE COURT SHOULD DENY THE RESPONDENTS REQUEST FOR ADDITIONAL ATTORNEY'S FEES ON APPEAL.

In the present case each party is financially able to pay his or her attorney and neither would be under a critical hardship to do so and therefore no award of fees or costs is appropriate. *In re Marriage of Wilson*, 117 Wn. App. 40, 68 P.3d 1121 (2003). Where each party to an

appeal regarding a child support modification order was able to pay his or her attorney and neither would be under a critical hardship to do so, an appellate court properly denies a request for attorney fees. *In re Belsby*, 51 Wn. App. 711, 754 P.2d 1269 (1988).

This section does not support an award of attorney fees to a party simply on the basis that they are "prevailing." Although the statute does invest appellate courts with discretion to order a party to pay fees and costs to the opposing party, that provision must be read in light of the fact that the statute ties the award of fees to a consideration of financial circumstances. *Spreen v. Spreen*, 107 Wn. App. 341, 28 P.3d 769 (2001).

The decision to award attorney's fees on a need versus ability to pay analysis is an equitable remedy in law. In the present case Mr. Brown has been forced to appeal due to the positions that the respondent has represented to the trial court and ultimately adopted by the trial court. It was the respondent who urged the trial court to use the average of seven years of overtime hours. 1/6/12 VRP 21. The respondent also is the party who asserts that Judge Serko's order does not allow for reimbursement of daycare expenses not actually incurred. 1/6/12 VRP 16-17. It was the respondent who asked the court to include all Mr. Brown's discretionary income. 1/6/12 VRP 19-21. And lastly it was the respondent who requested attorney's fees while recognizing that there was nothing filed in

the record showing fees actually incurred. 1/6/12 VRP 18-19. Therefore, it would be inequitable to require Mr. Brown to pay attorney's fees on appeal, as it was not his position that caused the necessity of this appeal.

The respondent requests attorney's fees as allowed for under RAP 18.9 based on the argument that Mr. Brown's appeal is frivolous. The respondent once again does not cite a single piece of law to substantiate her argument.

An appeal is frivolous if, considering the entire record and resolving all doubts in favor of the appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. *Ramirez v. Dimond*, 70 Wn. App. 729, 855 P.2d 338 (1993).

In determining whether an appeal is frivolous and brought for the purpose of delay, justifying the imposition of terms and compensatory damages, the court is guided by the following considerations: (1) a civil appellant has a right to appeal under RAP 2.2: (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; and (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there is no

reasonable possibility of reversal. *Federal Land Bank v. Redwine*, 51 Wn. App. 766, 755 P.2d 822 (1988)

When applying the above factors to the present case it is clear that Mr. Brown's appeal does not meet the legal definition of a frivolous appeal. The respondent's request for fees under RAP 18.9 should be denied.

II. CONCLUSION

Although the respondent's response is rich on oratory it is light on authority. As the court can see based upon the above argument, the respondent repeatedly fails to not only provide the law but also to apply the law to her argument.

The respondent has not provided a single legal argument as to why overtime incurred seven years ago is relevant to the appellant's current income. It is clear that including income earned seven years ago is not relevant to current earning ability and as such the court abused its discretion. Furthermore, the trial court did not examine any of the evidence regarding day care expenses, but rather incorrectly based its decision solely on the language of the parenting plan. In addition, the respondent does not put forth a single argument as to why inclusion of

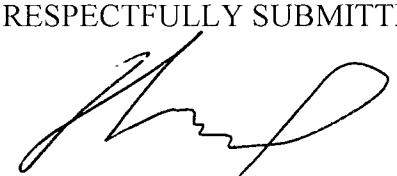
veteran's pay is appropriate when base incomes provide ample support for purposes of the child support statute.

Lastly, the respondent is not able to produce any evidence of attorney's fees actually incurred in the modification proceeding. The respondent is only able to offer a financial declaration stating what has been paid into the attorney's account, not what has been incurred. The respondent also asserts, without a single citation to legal authority, that the appellate court should grant her fees based upon a frivolous appeal. The record does not support this claim and rather it would be inequitable to award any fees on appeal.

As set forth above, Mr. Brown respectfully requests that this court reverse and remand this case to the trial court for further proceedings and requests that the respondent's request for additional attorney's fees be denied.

DATED the 20th day of August, 2012.

RESPECTFULLY SUBMITTED,



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Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by personal service, and delivered a copy of this document via personal delivery to the following:

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Signed at Tacoma, Washington on this 20th day of August, 2012.

Robert Helland

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